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Dr. William Godwin KC On Construction Law



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INTERVIEW

DR. WILLIAM GODWIN KC

On Construction Law

William Godwin KC specialises in commercial and technology and construction law, often with a cross border element, and in international arbitration. He sits as an arbitrator and adjudicator, and is a panel member of a number of international arbitration institutions. His recent sittings include serving on ICC arbitral tribunals hearing a number of major infrastructure disputes concerning projects in the Middle East.

Chambers UK have described him as '*an outstanding advocate*' and UK Legal 500 as '*very bright and experienced, providing detailed analysis of issues*', '*an expert on FIDIC contracts and related arbitration*', with '*very strong analytical skills and attention to detail*' and '*good credentials in the arbitration communities of China and Asia*'.

Dr Godwin is a graduate of University College London (First class) and Oxford University (BPhil, DPhil/PhD)) and author of numerous publications on commercial, construction and arbitration law. He is proficient in German. From 2014-21 he was a board member of the Great Britain-China Centre. He teaches a class on claims and dispute resolution at City, University of London, and is a visiting senior research fellow in philosophy at King's College London, working on topics that straddle law and philosophy.

In the construction field, Dr Godwin has particular expertise in FIDIC contracts and was legal member of the FIDIC Updates Task Group responsible for drafting the second edition of the FIDIC Red, Yellow and Silver Books. In 2020 Wiley Blackwell published his guide to the new contracts, *The 2017 FIDIC Contracts*; it has been translated into Chinese and is to be published in China. Illustrative cases as counsel include acting for French joint venture contractors in arbitration concerning EPC contract for container terminal project in North Africa and advising same client on nuclear containment works in Europe.

Dr Godwin's work also covers general commercial disputes, sale of goods, shipping, shipbuilding, insurance and commercial professional liability. Illustrative cases include acting for a major German industrial group in substantial and complex English Commercial Court proceedings arising from an acquisition-debt push down in 15 jurisdictions and related restructuring, involving conflicts of laws, German corporate law/ law of succession and Mexican tax advice; and appearing for the policy-holder accountants against insurers in the leading decision in *HLB Kidsons v Lloyds Underwriters and Others* [2009] Lloyd's Rep IR 8 (CA).

On arbitration law his cases as counsel include the landmark decision in *North Range Shipping Ltd v Seatrans Shipping Corp (The Western Triumph)* [2002] 2 Lloyd's Rep 1, on the extent to which the court should give reasons when refusing leave to appeal from arbitrators under s69 Arbitration Act 1996; and *Peterson Farms Inc v C&M Farming Ltd* [2004] 1 Lloyd's Rep 614, the first reported decision on the court's power under s70(7) Arbitration Act 1996 to secure an arbitral award pending an appeal or challenge.

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KC - The King's Counsel Magazine: Dr William Godwin, we are delighted to have a conversation with you on many facets of law such as commercial, construction and arbitration law. Your impressive profile provides an in-depth view of your exposure in the international arena. We feel that legal practitioners would benefit from your insights tremendously. If I may ask in which area of law or legal practice you feel that there has been tremendous change, compared to how we look at things twenty years ago?

Dr. William Godwin KC: It is a pleasure to take part; thank you for asking me.

In answer to your question, I would point to the growth of the regional centres of international arbitration, and the increasing trend for harmonisation in arbitration practices globally. Those I think are two of the most significant changes in cross-border or international legal work in the last twenty or so years. The rise of centres like Singapore have brought commercial arbitration to where disputes arise and the parties are based, and some of them are increasingly attractive alternatives to the

traditional centres such as London, Paris or Stockholm.

The harmonisation of arbitration practices, since the cornerstone of the New York Convention was laid in 1958, has been greatly facilitated by the adoption in many national laws of the UNCITRAL model law, or similar, improving and standardising the arbitral process at each stage. There remain significant differences between arbitrations taking place in different jurisdictions, over such matters as disclosure and the conduct of proceedings, and some differences are likely to be inevitable wherever legal traditions differ; but the work of the IBA - in setting out, for example, guidelines on the taking of evidence in international commercial arbitrations - has done a lot to iron-out differences and improve the process.

KC - The King's Counsel Magazine: I would like to focus now on FIDIC contracts; you have specialized in this area. For the benefit of readers, tell us why someone might trust FIDIC contracts as opposed to other types of construction contracts. What benefit would accrue to the principal if it engages a contractor on FIDIC provisions.?

Dr. William Godwin KC: One of the main reasons for choosing a FIDIC form is familiarity; the FIDIC suite of contracts constitute the most widely used standard form engineering and construction contracts in the world. They cover projects of many different types, and the major development banks often insist on their use (with modifications) in the projects they finance. Another reason is that the forms are well drafted and, by and large, set out clearly the allocation of risk between contractor and employer. This allocation will differ according to the particular type of project on which the parties are engaged and the constraints

under which the project sponsors may be operating. For example, in some types of project the works may be undertaken on a concession-type basis where the financial imperatives for completion on time and within budget are paramount; in that sort of case the project sponsors may agree a fixed lump sum price with the contractor that covers the full range of procurement, design and construction, with a corresponding risk allocation that places nearly all the risk of unforeseen circumstances on the contractor - who will expect an uplift on the lump sum price in return. Other types of project might not carry such a risk burden on the contractor, but might be priced according to work done at the contract rates.

The FIDIC forms cater to a range of different project-risk profiles and circumstances, and may be amended or adapted to suit the particular requirements of the parties. I had the privilege of helping to draft, as legal member of the FIDIC updates task group, the most recent edition of the three main forms, the 2017 editions of the Red, Yellow and Silver Books. These editions try to improve clarity and certainty by being generally more detailed, and prescriptive about such matters as variations to the works, adjustments to the price and the procedure for making claims and resolving disputes. They have been criticised for being too complex and prescriptive, but I think most people would agree that the FIDIC contracts in general provide a relatively flexible and well drafted standard form for international engineering or construction projects. The range of projects covered is also reflected in the existence of a number of specialist FIDIC forms, such as for design-build-operate projects, or for dredging or underground works.

KC - The King's Counsel Magazine: As well as construction law, you practise in commercial law. What are the main developments you have seen in recent times for parties to resolve international commercial disputes?

Dr. William Godwin KC: As well as the growth of international commercial arbitration, we have seen the development of international commercial courts, which are an important and interesting development; these courts take various forms, but they all seek to make the court system in the places where they operate more attractive to international parties than their normal domestic courts. The trend can be traced at least to the establishment of the Dubai International Financial Centre Court in 2006 and the Singapore International Commercial Court in 2015. Other international courts can be found in Abu Dhabi and Qatar, the Netherlands, France, Germany and China. The use of English in the conduct of proceedings is a common feature of the courts.

KC - The King's Counsel Magazine: You sit as an arbitrator and adjudicator; can you tell us what the difference is between arbitration and adjudication?

Dr. William Godwin KC: Yes, essentially an adjudication is an interim process, aimed at resolving a dispute without the need for a final stage such as arbitration or litigation. Adjudication clauses appear as standard in the FIDIC and other construction contracts, and in other contexts too. The process is less formal and more flexible than court or arbitration tends to be, and is normally much quicker, with a set timetable for the adjudicators to produce their decision. This will normally be binding unless within a specified time one or other of the parties notifies its dissatisfaction with it. Contracts may sometimes provide for a period for

settlement discussions to take place after the decision has been given and before an arbitration or other final process is begun; the FIDIC forms are a good example of this. Tiered dispute resolution clauses like that are often included in commercial contracts and provide a good opportunity to avoid the time, cost and risk of an arbitration or court process.

In some parts of the world it is usual to find the adjudication provisions in the standard form contract deleted. This might be sensible in the particular case, but parties should think carefully about whether to take such a step. If properly engaged with, an adjudication can work well and, in my experience, may well result in an end to the dispute. One has to be careful in the choice of adjudicators, just as one has to when selecting arbitrators.

KC - The King's Counsel Magazine: You have had the privilege of defending a Chinese shipping company for damage for breach of contract of affreightment on a charter party based on LMAA arbitration clauses. Could you elaborate on the benefits of relying on LMAA arbitration clauses as opposed to arbitration provisions in Singapore for instance?

Dr. William Godwin KC: The LMAA is the London Maritime Arbitrators' Association and it publishes rules for the conduct of maritime arbitrations and offers a panel of experienced maritime arbitrators from whom the arbitrator or arbitrators may be selected. The LMAA does not administer arbitrations, and so does not charge fees for this, whereas the Singapore International Arbitration Centre (SIAC), to take your example, is an administering body. The benefits of using the LMAA are, in general, that its rules are well drafted and its panel members experienced in a range of different disciplines; although many parties will want their arbitrations to be

administered by an organisation such as SIAC.

KC - The King's Counsel Magazine: When sitting as an arbitrator is it easy to switch out of the mind-set of an advocate? How do you find the role of arbitrator?

Dr. William Godwin KC: It is demanding work, but satisfying. A good working relationship between the members of the panel – usually three in international commercial and construction arbitrations – is important, because there will be a lot of factual and expert evidence to consider in most disputes, along with the applicable law, and the members will need to co-operate and work efficiently together.

I sharply distinguish the roles of advocate from arbitrator. Although in a three-person panel the parties will each typically nominate one arbitrator, everyone involved signs a declaration of impartiality and that reflects the objectivity with which an arbitrator has to decide the dispute. One's attitude changes when one is sitting on the other side of the table from the advocates. No party is your client, and everyone knows that your task is to arrive at a decision based on the evidence and the applicable law.



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